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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIAN JORGENSEN d.b.a. MEDICINE
MAN PHARMACY and MEDICINE MAN
PHARMACY, INC., and Idaho corporation,

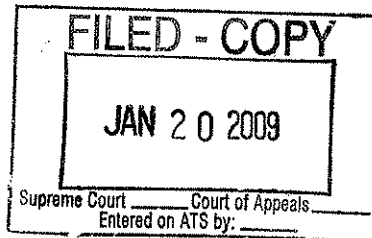
Respondents,

vs.

C. MICHAEL COPPEDGE and KAREN COPPEDGE, individually and as the last Board of Directors and shareholders of Acology Prescription Compounding, Inc, and ACOLOGY PRESCRIPTION COMPOUNDING, INC. a dissolved Idaho corporation,

Appellants

Supreme Court No. 35575



APPELLANTS' BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Bonner

Honorable John T. Mitchell, presiding

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INTRODUCTION

This appeal addresses the limited issue of whether defendants/appellants, C. Michael Coppedge and Karen Coppedge (the “Coppedges”) are entitled to an award of a reasonable attorney fee at trial. After entry of the judgment directed by this Court following the first appeal in this matter¹ and after determining that the Coppedges were the prevailing parties for the purposes of costs in what unquestionably is an action to enforce a contract and involving commercial transaction, the trial court denied the Coppedges any fees because it thought it “unfair ... to saddle the plaintiff” with the Coppedges’ fees. Imposing its own sense of justice, the trial court refused to even award the Coppedges that portion of the fees they incurred which were specifically and solely attributable to plaintiffs’ claims against them.

STATEMENT OF THE CASE

This action comes before this Court for the second time. The first time, this Court held the trial court erred in finding a covenant in a partnership/joint venture buyout agreement that required the Coppedges to pay \$12,000.00 per month to plaintiffs as a condition of being able to do business in the Coeur d'Alene area was not an overbroad, unenforceable covenant not to complete. In so doing, this Court reversed the trial court’s order for a new trial and a judgment based on a jury verdict in favor of plaintiffs *with directions plaintiffs’ complaint be dismissed with prejudice*.

On May 12, 2008, as instructed by this Court, the trial court entered a judgment of

¹ *Jorgensen v. Coppedge*, 181 P.3d 450 (2008).

dismissal in favor of the Coppedges (LR 13)². On May 13, 2008, the Coppedges filed their Memorandum of Costs and Attorneys Fees (LR 19), a Motion to Fix Attorneys Fees (LR 16) and an Affidavit in Support thereof (LR 23).

Plaintiffs responded on May 27, 2008 with a Motion to Disallow Costs and Fees (LR 49). In their motion, plaintiffs argued that the Coppedges were not the prevailing parties since they did not prevail on their counterclaim. Alternatively, plaintiffs argued that any award of fees should have been minimal, blaming the Coppedges for not bringing the issue of the enforceability of the contract provision they so vigorously defended through the highest court of this State before the trial court in a motion for summary judgment. Plaintiffs suggested that had the Coppedges made their argument earlier “it is possible” the case would have been terminated before the bulk of the fees were incurred LR 52).

The Coppedges replied to plaintiffs’ motion on June 3, 2008 (LR 55). In their response, the Coppedges pointed out to the trial court the procedural and substantive failings of the plaintiffs’ arguments. They correctly apprised the trial court that the legal issue of the enforceability of the covenant as plaintiffs were then advocating was not new to the case and should not have been a surprise to plaintiffs. The issue was also one that could not be addressed in a summary judgment motion since its application rested on first resolving whether the contract created a franchise relationship as plaintiffs alleged and advocated until they conceded that point on the first day of trial (Tr 9, L 12). The Coppedges also pointed out to the trial court that they had prevailed on the fundamental claim in the case, the issue that had prompted the lawsuit,

² “LR” refers to the “limited” Clerk’s Transcript per this Court’s Order Augmenting Record of August 22, 2008. “LTr” shall refer to the “limited” Reporter’s Transcript.

brought the parties to court, and forced the Coppedges to raise in defense all issues that the operative facts of the case mandated be presented. Lastly, the Coppedges advised the trial court of the fact that the Coppedges had offered in a formal mediation of their dispute with plaintiff (one that occurred several years before this action was even filed) to settle all claims by paying plaintiffs a very substantial sum of money (LR 62).

At the hearing on the parties' respective motions, the trial court denied the Coppedges' Motion to Fix Attorneys Fees and granted plaintiffs' Motion to Disallow Fees. In so doing, the trial judge's reasoning was at odds with established Idaho law in two major respects. First, after correctly finding that the Coppedges the prevailing parties under IRCP 54(d)(1)(B) and were thus entitled to costs "as a matter of right" (LTr 18, L 4; LR 78), the trial judge ruled that the award of fees was still discretionary. The trial judge then held that he considered the case a "split decision" since the Coppedges did not prevail on their counterclaims (LTr 18, L 15). The reasoning extended even to post-trial fees that related solely to plaintiffs' efforts to secure an additur or new trial that had nothing whatsoever to do with the Coppedges counterclaim (LTr 22, L 2).

The second ground announced by the trial court explained what was truly behind its decision to deny the Coppedges fees. The trial judge announced that had the issue of the breadth of the covenant been brought to his attention earlier he "may well have had a better shot at making the right decision regarding that issue if it wasn't in the heat of trial" (LTr 18, L 25). He went on to say that he felt "badly that fees were expended by both parties after that decision of mine during trial" and then opined that he might have done a better job had the issue been

brought to him earlier (LTr 19, L 4). Speculating that a trial might have been avoided had he had more time to consider the issue and even though he could not fault the Coppedges for the timing of their challenge to the enforceability of the covenant, the trial judge thought it “unfair to saddle the plaintiff with all fees really for the whole litigation” (LTr 19, L18). Translated to the bottom line, the trial court’s order meant that plaintiffs were not responsible for “any” of the fees the Coppedges incurred in defending a case that would not have been brought had plaintiffs properly analyzed their case at the outset.

Refusing to consider the fact that thousands of dollars in fees had been incurred by the Coppedges defending plaintiffs’ multiple efforts to secure a new³ trial or that the litigation, not just the trial, could have been avoided altogether had the Coppedges attempts to settle the case been accepted (LTr 20, L 16), the trial court entered its order holding the Coppedges the prevailing parties for the purposes of costs, but not for attorneys fees (LR 77).

This appeal followed.

ISSUES PRESENTED ON APPEAL

1. Did the trial court err in refusing to award fees to the prevailing party in litigation for breach of contract involving a commercial transaction?
2. Alternatively, did the trial court err in refusing to award fees to the prevailing parties for defending matters solely related to plaintiffs’ claim for damages?
3. Was the trial court precluded from considering the pre-litigation settlement negotiations of the parties when applying the factors outlined in IRCP 54(e)(3)?

³ Plaintiffs’ post-trial actions and the issues raised are detailed on pages 11-13 of the Coppedges’ Opening Brief in the first appeal.

4. Are the Coppedges entitled to a reasonable attorney fee on appeal?

ARGUMENT

A. Attorneys Fees – In General. An award of attorneys' fees to a party to a civil action requires the trial court to conduct a three-part analysis. First, the trial court must determine if there is a statutory or contractual basis authorizing an award of fees to the prevailing party. Second, if such a basis exists, the trial court must determine if the party seeking an award of fees is the prevailing party (IRCP 54(e)(1)). To do so, the trial court must conduct the discretionary analysis required by IRCP 54(d)(1)(B). Finally, if it determines a party prevailed in an action for which an award of fees is authorized, the trial court must determine, in the exercise of its sound discretion, the amount of fees to be awarded. To properly exercise its discretion, the trial court must consider, at a minimum, the 12 factors outlined in IRCP 54(e)(3) (*Medical Recovery Services, LLC v. Jones*, 175 P.3d 795 (App. 2007)).

B. The Coppedges Prevailed In An Action In Which An Award Of Fees Is Mandated. The first two elements of the three-part analysis required for the award of reasonable attorneys' fees to the Coppedges are present. First, the plaintiffs' claims against the Coppedges were without question to recover on a contract *and* arose out of a commercial transaction between the parties. An award of fees was thus authorized to the prevailing party on two grounds under Idaho Code § 12-120(3).

Second, the trial court found that the Coppedges were the prevailing parties under IRCP 54(d)(1)(B) for the purposes of costs (LTr 18, L 4; LR 78). After so finding, the trial court

awarded the Coppedges 100% of the costs they incurred recoverable as a matter of right under IRCP 54(d)(1)(C) (R 19). Plaintiffs have not challenged that finding by cross-appeal.

C. The Coppedges Are Entitled To Fees At Trial. As the prevailing parties in an action on a contract arising from a commercial transaction between the parties, the Coppedges were “*entitled*” to an award of fees under Idaho Code § 12-120(3) (*Medical Recovery Services, LLC v. Jones, supra*, at 798 (App. 2007); *Iron Eagle Development, LLC v. Quality Design Systems, Inc.*, 138 Idaho 487, 493 (2003); *Chadderdon v. King*, 104 Idaho 406, 412 (App. 1983)). Once a trial court, in the exercise of its sound discretion, determines a party prevailed in an action governed by Idaho Code § 12-120(3), the court is “required to award costs and attorney fees” (*Ervin Construction Co. v. Van Orden*, 125 Idaho 695 (1994)).

The trial court in this case, however, perceived that despite its determination that the Coppedges were the prevailing parties and entitled to costs as a matter of right that an award of attorneys fees to the Coppedges was still a matter purely within its discretion (LTr 18, L 4). Instead of recognizing that the amount of fees to be awarded was a discretionary issue premised upon the application and analysis of the factors set forth in IRCP 54(e)(3), the trial court believed it had the option of simply denying fees altogether. Doing so was error.

The trial court also erred on both grounds it recited to support its discretionary denial of fees to the Coppedges. First, after specifically finding that the Coppedges were the prevailing parties for the purposes of costs, the trial court make the wholly inconsistent observation that it considered the case a “split decision” since the Coppedges did not prevail on their counterclaims. That justification for its decision, however, is not only belied by its finding the Coppedges were

the prevailing parties for the purposes of costs, but ignores (a) that the Coppedges won on the main issue in the case (the only issue that brought the parties to court) and (b) that the issues raised in the Coppedges' counterclaims would have been asserted in defense of plaintiffs claims anyway (R 16, Third Affirmative Defense). The same evidence, and thus the same time and effort, would have been introduced as to those defenses whether or not affirmative relief was sought. The Coppedges were thus in no different (or inconsequently different) a position than the defendants in either *Eighteen Mile Ranch v. Nord Excavating*, 141 Idaho 716, 719 (2005) or *Chadderdon v. King*, *supra*.⁴

Second, the trial court clearly decided to use what it perceived to be its discretionary right to deny an award of fees as a means "to vindicate its sense of justice beyond the judgment rendered", a factor impermissible under Idaho law (*Medical Recovery Services, LLC*, *supra* at 799; *Evans v. Sawtooth Partners*, 111 Idaho 381, 387 (App. 1986). While even hinting that righting a wrong as a motive for denying a fees award is error (*Eighteen Mile Ranch*, *supra* at 720), the trial court here made clear that that was precisely its motivation. Supposedly without faulting the Coppedges and professing its sorrow for not making the correct decision as to the enforceability of the covenant upon which plaintiffs' entire case rested, the trial court stated unequivocally that it thought it would be unfair under the circumstances to place the costs of this litigation on plaintiffs (LTr 18, L 17 – 19, L 21).⁵ Boiled to the essence, the trial court felt it just

⁴ In both cases, defendants who defeated the plaintiffs' claims were entitled to fees despite either losing or securing only a pyrrhic victory on their counterclaims.

⁵ The Coppedges cannot be blamed for not giving the trial court the opportunity to make the correct decision. The issue of the enforceability of the covenant at issue was brought to the attention of the trial court in the Coppedges Trial Brief on October 17, 2005, one week before trial began (R 55). Before jury selection began, the issue was

that the Coppedges bear *all* of the fees they incurred in defending a case that would not have been brought had plaintiffs properly analyzed their case at the outset or which largely would have been avoided had the trial court been given more time to make a correct decision as to plaintiffs' interpretation of the contract.⁶ The trial court was obviously employing its own view of equity rather than considering the factors required by IRCP 54(e)(3).

D. The Coppedges Are Entitled To Their Fees Without Apportionment. Should this matter be remanded to the trial court, instructions should be given to the trial court that the fees to be awarded the Coppedges are not to be apportioned.

In their counterclaim, the Coppedges asserted causes of action for fraud, breach of contract, unfair competition, and interference with a business advantage. The later two causes of action were not pursued at trial, with only the fraud and breach of contract claims being submitted to the jury. Evidence supporting both theories would have been presented in defense of the case after the trial court concluded the interpretation of the covenant plaintiffs were advocating was not unenforceable whether or not a counterclaim was filed.

The fact that the Coppedges did not recover on a defensive counterclaim that never would have been filed had plaintiffs not started a fight they legally should not have does not mean that the Coppedges were not the prevailing parties (*Chadderdon v. King, supra*). The Coppedges

addressed with the trial court as one that would have to be resolved before the case was submitted to the jury (Tr 10, L 1). Plaintiffs filed responsive briefing on October 26, 2005 (R 155) and the matter was argued 2 days later at the conclusion of the evidence (Tr 1059, L 9). Nowhere in the record does the trial court complain that it did not have sufficient time to fully analyze the issues raised by the Coppedges or that it was caught by surprise.

⁶ Presumably, based on its reasoning, the Coppedges would have been awarded fees had the trial court made the correct ruling as to the enforceability of the covenant.

prevailed on the only claim that mattered in this case, a claim plaintiffs valued at well over \$1,000,000 (Tr 1124, L 8 – Tr 1128, L 4) and one they thought justified the weeklong jury trial.

More importantly, the trial court erred in refusing to consider the efforts made by the Coppedges to settle the case before this action was filed. At the hearing on plaintiffs' motion to disallow fees to the Coppedges, however, the trial court ruled that since the Coppedges were claiming a right to fees their claim was a "claim" within the meaning of IRE 408 (LTr 20, L 16). The trial court therefore refused to consider the fact that the Coppedges had offered to resolve all contractual issues between the parties on terms that, under the circumstances, were far superior to what plaintiffs achieved in this action (LR 62). In so doing, the trial court erred.

In doing so, the trial court ignored not only the mandate of IRCP 54(e)(3)(G) which requires the trial court to consider the amount involved and the results obtained, but numerous cases in which the settlement efforts of a party were considered in evaluating the award of fees after trial. For example, in *Etcheverry Sheep Co. v. J. R. Simplot Co.*, 113 Idaho 15, 18 (1987) this Court, citing *Sigdestad v. Gold*, 106 Idaho 693 (App. 1984), stated:

".... a district court is not precluded from considering pretrial settlement negotiations in determining whether the criteria of Rule 54(e)(1) have been established."

In *Etcheverry*, this Court was dealing with a request for attorneys' fees under IC § 12-121, but the rationale should apply equally to a request under IC § 12-120.

In accord is the case of *Yellowpine Water User's Ass'n v. Imel*, 105 Idaho 349 (1983) in which the defendant's pre-litigation tender was a determinative issue. In *Yellowpine*, the plaintiff won a positive monetary award and defeated the defendant's counterclaim because the

defendant had not been able to prove any compensable damages. Despite that result, this Court held that as a matter of law the plaintiff was not the prevailing party and thus overturned the trial court's award of attorneys' fees. This Court found that the defendant had offered to pay what was determined by the trial court to be due before the lawsuit was filed and that the plaintiff had pursued the litigation demanding much more money than the defendant owed.

The same result occurred in *Medical Recovery Services, LLC v. Jones, supra*. In that case, the Court of Appeals found that a minimal award of fees to the prevailing plaintiff was appropriate since a high percentage of the fees incurred could have been avoided had the plaintiff properly addressed the defendant's settlement overtures (*Id* at 800).

Clearly, by filing and pursuing this case to trial, plaintiffs "took a flier" that they could score more than what was offered them in settlement. The "result obtained" by the Coppedges was a complete defense of the only claim that motivated the filing of this lawsuit. The fact that the Coppedges were not successful on a defensive counterclaim that would not have been brought "but for" plaintiffs' decision to file suit changes nothing, nor would that fact have reduced the time expended in trial since those matters would have been raised in defense of plaintiffs' claims had no counterclaim been filed.

E. Fees For Post-Trial Issues. After the jury's verdict, plaintiffs caused the Coppedges many thousands of dollars of expense in defending their multiple efforts to secure prejudgment interest, attorneys' fees and relief from what was a clearly disappointing jury verdict. Plaintiffs first filed a Motion for a New Trial or, in the alternative, an Additur, which necessitated extensive briefing and argument (R 221 – 254, Tr 1237, L 1). At the same time,

virtually 10 months after the jury's verdict, plaintiffs presented a form of judgment to the trial court in which also awarded prejudgment interest (R 216). That too required the Coppedges to incur further fees to oppose plaintiffs' request for interest on what was clearly not a liquidated sum (R 238, Tr 164, L 1). Plaintiffs followed with a second motion for a new trial (R 275) and a motion to fix attorneys fees at trial.⁷ Those motions also prompted extensive briefing (R 329-336, Tr. 1274). Following the decision to grant a new trial, the Coppedges were also forced to oppose plaintiffs' effort to keep the liability portion of the verdict so that the only issue to be addressed on re-trial was the award of damages (R 359 – 364).

Nothing that occurred after the jury verdict was entered had anything whatsoever to do with any defense or counterclaim of the Coppedges. One hundred percent of what transpired after trial was directly related to the plaintiffs' breach of contract claim against the Coppedges. The trial court refused, however, to award the Coppedges any post-trial fees even though it apparently agreed that those fees had nothing to do with the Coppedges' counterclaim (LTr 21, L 22; 22, L 2). Doing so was clear error. The Coppedges are at the very least entitled to an award of fees for defending themselves against plaintiffs' efforts to secure a "second bite" a recovering breach of contract damages against them.

F. The Coppedges Are Entitled To Fees On Appeal. When an appeal in a case subject to IC § 12-120 concerns the entitlement to fees, as opposed to the amount of fees awarded, the prevailing party is entitled to an award of fees on appeal (*Daisy Mfg. Co., Inc. v.*

⁷Plaintiffs' motion to fix attorney's fees and the Coppedges' opposition thereto are not contained in the record, but are referenced in the reporter's transcript (Tr 1274, L 11). That motion was not decided given the trial court's grant of a new trial (Tr 1299, L 6).

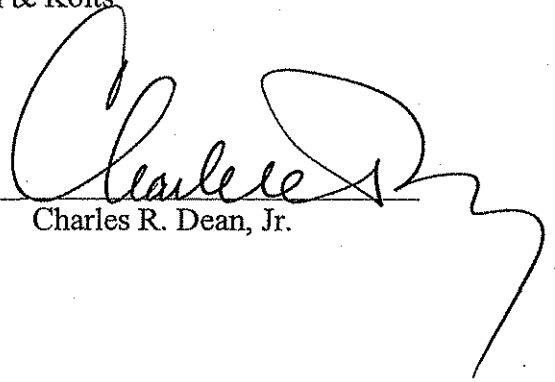
Paintball Sports, 134 Idaho 259, 263 (App. 2000)). This appeal clearly involves the Coppedges' entitlement to fees and thus an award of fees to them on appeal is proper.

Respectfully Submitted.

Dated: January 15, 2008

Dean & Kolts

By

A handwritten signature in black ink, appearing to read "Charles R. Dean, Jr.", written over a horizontal line. The signature is stylized with large loops and a long trailing flourish extending to the right.

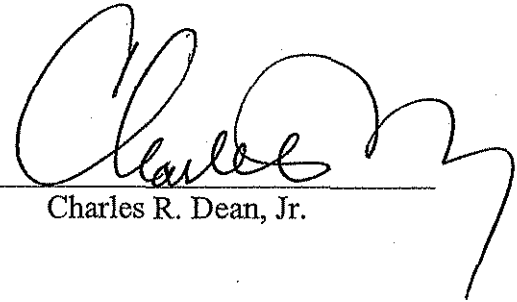
Charles R. Dean, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of January 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Susan P. Weeks
James, Vernon & Weeks
1626 Lincoln Way
Coeur d'Alene, Idaho 83814

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Charles R. Dean, Jr.